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ADMINISTRATIVE  
RECORDUNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION VIII

FILE PLAN

13.01

IN THE MATTER OF: )

HOME DEPOT U.S.A., INC. )

) AGREEMENT AND COVENANT

) NOT TO SUE

) RE: DENVER RADIUM SITE OPERABLE

) UNITS IV &amp; IX

) UNDER AUTHORITY OF THE  
) COMPREHENSIVE ENVIRONMENTAL  
) RESPONSE, COMPENSATION, AND  
) LIABILITY ACT OF 1980, AS  
) AMENDED, 42 U.S.C. §§9601  
) et seq.  
)  
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## ATTACHMENTS

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## EXHIBITS

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I.            INTRODUCTION

A.     This Agreement and Covenant Not to Sue (Agreement) is made and entered into by and between the United States Environmental Protection Agency (EPA), Colorado Department of Public Health and Environment (CDPHE or State) and Home Depot U.S.A., Inc. (Home Depot). The above parties are herein collectively referred to as the "Parties."

B.     EPA enters into this Agreement pursuant to the authority conferred on the President by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. § 9601 et seq. This Agreement is consistent with current EPA guidance. The State enters into this Agreement pursuant to its authority to protect the public health, safety, and the environment under Article 16.5 of Title 25, Colorado Revised Statutes (as amended).

C.     The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The primary purpose of this Agreement is to settle and resolve, subject to the reservations and limitations contained in Parts X. and XI., (United States' and State's Reservation of Rights and Home Depot's Reservation of Rights, respectively), the potential liability of Home Depot for the Present Contamination at the Robinson Brick Company (ROBCO) Property which may result from Home Depot's acquisition of the ROBCO Property for construction of a retail sales facility. Resolution of this potential liability, in exchange for provision by Home Depot to EPA and the State of a

substantial benefit that would otherwise not be available to the EPA or the State, is in the public interest.

D. Based upon currently available information, the remedial actions selected in the September 30, 1986 Record of Decision (ROD) for Operable Unit IV (OU IV) and the December 23, 1991 ROD for Operable Unit IX (OU IX) of the Denver Radium Site, including implementation thereof by the remedial actions described in Exhibit 1 to this Agreement, constitute all reasonably anticipated response activities for the ROBCO Property.

## II. DEFINITIONS

Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or such regulations. Whenever terms listed below are used in this Agreement, the following definitions shall apply:

A. The "Property" or "ROBCO Property" shall mean that parcel of land, commonly known as the Robinson Brick Company, located at 500 South Santa Fe Drive, City and County of Denver, Colorado. The Property is more particularly described in Attachment 1 to this Agreement.

B. The "Site" shall mean OU IV & OU IX of the Denver Radium Site, which consists of the areal extent of contamination and all suitable areas in close proximity to the contamination necessary for implementation of remedial activities. The ROBCO Property is encompassed by the Site.

C. "Hazardous Substances" shall have the same meaning provided in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

D. "Pollutant or contaminant" shall have the same meaning provided in Section 101(33) of CERCLA, 42 U.S.C. § 9601(33).

E. "Certification" shall mean a written statement from EPA, given after a reasonable opportunity for and review and comment by the State, to Home Depot stating that the response actions as described in Exhibit 1 have been completed at the Site. The response actions described in Exhibit 1 constitute all reasonably anticipated response activities to be implemented at the Site, with the exception of the five-year reviews required by Section 121(c) of CERCLA, 42 U.S.C. § 9621(c) and maintenance required under the maintenance plan to be prepared pursuant to this Agreement.

F. "Contamination" shall mean the presence of hazardous substances, or pollutants, or contaminants within the meaning of Section 101(14) and 101(33) of CERCLA, 42 U.S.C. §§ 9601(14) and 9601(33).

G. "Pre-Consolidation Area of Contamination" shall mean the area within the Property identified to have levels of lead, arsenic, or zinc above the action levels established in the ROD for OU IX before implementation of the response actions described in Exhibit 1.

H. "Post-Consolidation Area of Contamination" shall mean the area within the Property identified to have levels of lead, arsenic, or zinc above the action levels established in the ROD for

OU IX after implementation of the response actions described in Exhibit 1.

I. "Present Contamination" shall mean any contamination by any hazardous substances, pollutants, contaminants, or solid wastes within the Property present or existing as of the date Certification is issued pursuant to Part IV, Paragraph F of this Agreement, or in the event Home Depot acquires the Property prior to Certification as of the date of acquisition.

J. "Metals-Contaminated Soils" shall mean soils with levels of lead, arsenic, or zinc above the action levels established in the ROD for OU IX.

### III. STATEMENT OF FACTS

A. Field research conducted in 1979 by EPA revealed the presence of thirty-one (31) radioactive properties in the Denver metropolitan area. These contaminated areas are believed to be either the direct result of radium, vanadium, and uranium processing on the properties or the result of processing waste being transported to the properties from a processing site. As a result of the release or threatened release of hazardous substances, pollutants or contaminants into the environment from these properties, EPA placed the properties (collectively known as the Denver Radium Site) on the National Priorities List (NPL) on September 8, 1983 pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605. Placement of the Denver Radium Site on the NPL was based on engineering assessments and Site investigations conducted by EPA

and the CDPHE. The ROBCO Property was included as OU IV of the original Denver Radium Site in 1983. After metals-contaminated soils were discovered on the ROBCO Property in 1988 during remediation of the radioactive contamination, OU IX was designated to cover the metals contamination.

B. Industrial activity on the ROBCO Property began in 1886 with the construction of the Bailey Smelter. The Bailey Smelter appears to have operated only sporadically in the late 1880's. In 1890, the Gold & Silver Extraction Company began a cyanide leaching operation on the Property using the McArthur Forrest Chemical Cyanide Process. In 1901, the Bailey Smelter burned down. By 1903, the Colorado Zinc Company had constructed a mill on the Property. Zinc milling operations continued until about 1910. From 1911 to 1917 the Sutton, Steele, and Steele Mining and Milling Company operated a dry concentrating process and custom mill in an area at the north end of the Property. From 1914 to 1917, the United States Bureau of Mines (BOM) operated a Radium processing facility (the National Radium Institute) on the Property. Other industrial activities on the Property have included minerals recovery, manufacturing and servicing of storage batteries, treating and sacking of metallic ore insulation, oil reclamation, and landfilling. In 1941, ROBCO acquired 13.5 acres of the Property and in 1951 acquired an additional 3.5 contiguous acres. ROBCO manufactured bricks on the Property until 1980 and is the present owner of the Property.

C. EPA has undertaken response actions on the Site under Section 104 of CERCLA, 42 U.S.C. § 9604. EPA will continue to undertake response actions at the Site in the future.

D. Home Depot, a Delaware corporation, proposes to acquire the Property for the purpose of constructing a retail sales facility for its home improvement supplies business. The facility is expected to provide an opportunity for economic development in the surrounding commercial areas. Home Depot will perform or cause to be performed, as provided in Part IV and described in Exhibit 1, response actions at the Site.

E. In the absence of this Agreement, purchase of the Property by Home Depot could subject Home Depot to joint and several liability for reimbursement of response costs as an owner of the Property, under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1). Home Depot represents that it would not purchase the Property without the benefits and protections against future liability set forth in this Agreement.

F. Home Depot represents, and for the purposes of this Agreement, EPA and the State rely on those representations, that Home Depot's involvement with the Property has been limited to the performance of a property evaluation and sampling for metals contamination both conducted in 1994. Home Depot represents that it did not in any way cause or contribute to the release of hazardous substances at the Site, that it is not presently liable for CERCLA response costs under Section 107(a) of CERCLA, 42 U.S.C.



§ 9607(a), and that it has not engaged in any of the activities described in said Section of CERCLA.

G. Based on the facts and conditions described herein, EPA and the State have determined that prompt settlement with Home Depot is practicable and in the public interest.

H. Following execution of this Agreement by all Parties, EPA, the State, and Home Depot will implement the remedial actions described in Exhibit 1, in accordance with the allocation of responsibilities set forth therein. Following execution of this Agreement by all Parties, Home Depot will be permitted to develop and use the Property in compliance with the conditions specified in Parts IV. & V., (Consideration and Access/Notice/Institutional Controls, respectively), of this Agreement.

I. The response actions Home Depot has agreed to perform or cause to be performed, including, but not limited to, constructing and maintaining the cap, will save EPA and the State from having to perform those response actions. By performing these response actions, Home Depot will provide EPA and the State with a substantial benefit which would not otherwise be available to EPA and the State.

#### IV. CONSIDERATION

A. Home Depot intends to acquire the ROBCO Property from its present owner following execution of this Agreement; provided however, nothing contained herein shall be construed as requiring Home Depot to acquire the Property. If Home Depot closes on the

purchase of the Property, Home Depot shall assure that any deed from the owner of the ROBCO Property to Home Depot shall contain deed restrictions or refer to covenants restricting Home Depot's use and development of the Property in conformance with the institutional controls set forth in Part V, (Access/Notice/Institutional Controls), as set forth in Exhibit 2 (the Notice and Covenant), which Notice and Covenant has been approved by EPA and the State. The deed or covenants shall also grant to EPA and the State a right to enforce said deed restrictions/covenants. In addition, should Home Depot sell the Property in the future, Home Depot shall include in any deed to such future owner reference to the Notice and Covenant that restricts that future owner's use and development of the Property in conformance with the institutional controls set forth in Part V, (Access/Notice/Institutional Controls).

B. Contamination will remain on the Property after Home Depot's acquisition. Therefore, Home Depot agrees to develop and use the Property in conformance with the terms of this Agreement and to implement and maintain all institutional controls required by Part V., (Access/Notice/Institutional Controls), of this Agreement.

C. The parties agree that the remedial actions described in Exhibit 1 shall be performed by EPA and Home Depot in accordance with the allocation of responsibility as specified in Exhibit 1.

D. Home Depot shall maintain the Site in compliance with a maintenance plan, to be developed by Home Depot in accordance with

the maintenance plan statement of work attached hereto as Exhibit 3, and approved by EPA, after reasonable opportunity for review and comment by the State. Upon approval of the maintenance plan by EPA, after reasonable opportunity for review and comment by the State, the maintenance plan shall be incorporated into and become enforceable under this Agreement.

E. Provided Home Depot implements the remedial actions described in Exhibit 1 and complies with the terms of this Agreement, this Agreement is in the public interest and will facilitate response actions that are not inconsistent with the National Contingency Plan (NCP), and are consistent with the remedy selected for the Site.

F. Following satisfactory completion of all remedial actions described in Exhibit 1, EPA, after a reasonable opportunity for review and comment by the State, shall issue its Certification, as defined in Part II., (Definitions), Paragraph E.

V. ACCESS/NOTICE/INSTITUTIONAL CONTROLS

A. Upon Home Depot's acquisition of the Property, Home Depot shall grant to EPA and the State, their employees, authorized representatives, contractors, agents, and all other persons performing response actions under EPA's or the State's oversight, an irrevocable immediate right of access at all reasonable times to the Property for the purposes of monitoring compliance with the terms of this Agreement and performing and overseeing response actions selected in the RODs for OU IV and IX at the Site and

conducting five-year reviews as provided in Section 121(c) of CERCLA, 42 U.S.C. § 9621(c). EPA or the State agree to provide Home Depot with reasonable advance notice of the performance of the response actions set forth in Exhibit 1 at the Property. Notwithstanding any provision of this Agreement, EPA and the State retain all of their access authorities and rights, including enforcement authorities related thereto, under CERCLA, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901, et seq., or any other applicable federal or State statute or regulation.

B. Within 15 days after Home Depot's acquisition of the Property, Home Depot shall record in the office of the Clerk and Recorder for the City and County of Denver, the Notice and Covenant attached hereto as Exhibit 2. Thereafter, each deed, title, lease, or other instrument conveying an interest in the Property shall contain a notice stating that the Property is subject to this Agreement.

C. Home Depot agrees that uses of the Property shall be restricted to nonresidential uses which are compatible with maintaining the integrity of the cap. The Property is presently zoned industrial I-2 by the City and County of Denver. Home Depot agrees that it shall not seek to have the Property zoned or designated for residential use, recreational use, or any other uses inconsistent with the remedy selected in the ROD for OU IX or incompatible with maintenance of the integrity of the cap.

D. Home Depot agrees that it shall not drill or allow others to drill water wells on the Property, with the exception of

groundwater monitoring wells. Home Depot agrees that it shall not use groundwater or allow others to use groundwater from beneath the Property for any purpose.

E. Development of the Property, including development within the Pre-Consolidation AOC, will be permitted in compliance with this Agreement. All Metals-Contaminated Soil excavated from within the Pre-Consolidation or Post-Consolidation AOC by Home Depot during development of the Property, or otherwise, shall either be redeposited within the Post-Consolidation AOC and capped, or if not redeposited within the Post-Consolidation AOC, shall be disposed at a Resource Conservation and Recovery Act Subtitle C permitted facility in compliance with EPA's Off-Site Rule, 40 C.F.R. § 300.440. Prior to redepositing such soils within the Post-Consolidation AOC or shipment off-site for disposal, Home Depot shall notify EPA and the State. Home Depot shall ensure that no Metals-Contaminated Soils are deposited on the Property outside of the Post-Consolidation AOC, and that the entire Post-Consolidation AOC has a cap, approved by EPA, after an opportunity for review and comment by the State, upon completion of construction.

F. Home Depot acknowledges that it is purchasing property where response actions are presently anticipated, pursuant to the RODs for OUs IV and IX. Home Depot further acknowledges that the implementation of response actions may interfere with Home Depot's use of the Property, and may require temporary closure of its operations or a part thereof. EPA and the State agree that, if metals-contaminated soils with contamination levels in excess of

EPA action levels are removed from beneath Home Depot's building foundation, they will use every reasonable effort to avoid performing any response action which might jeopardize or undermine such building foundation and the ground level floor supported by such foundation. Home Depot agrees to cooperate with EPA and the State in the implementation of response actions selected in the RODs for OU IV and OU IX at the Site, and further agrees not to interfere with such response actions. Consistent with EPA's responsibilities under federal law and consistent with the State's responsibilities under State and federal law, EPA and the State shall use reasonable efforts under the circumstances to minimize any interference with Home Depot's operations by such response actions.

G. Home Depot shall provide in any leases or deeds for sale or use of the Property that all current and future owners, lessees, sublessees, transferees, and assignees of the Property must provide the same access, use restrictions, and cooperation, as Home Depot provides to EPA and the State under this Agreement, and that any such lease or deed for sale is subject to this Agreement. Home Depot shall ensure that a copy of this Agreement is provided to any current owner, lessee, or sublessee on the Property at the effective date of this Agreement and shall ensure that any subsequent leases, subleases, sales, assignments or transfers of the Property by Home Depot are consistent with and subject to this Agreement.

H. Home Depot is not obligated under this Agreement to provide funds, materials, supplies or personnel for completion of the remedy, except as specifically provided in this Agreement.

I. Home Depot agrees that it shall not use the Property in any way which may aggravate, exacerbate, or contribute to Present Contamination at the Property. EPA and the State acknowledge that Home Depot's implementation of remedial actions in conformance with Exhibit 1 and construction of a retail store and parking lot on the Property in conformance with Exhibit 1 and the maintenance plan approved by EPA is not expected to aggravate, exacerbate, or contribute to Present Contamination at the Property.

J. The Parties agree that Home Depot's entry into this Agreement, and the actions undertaken by Home Depot in accordance with this Agreement, do not constitute an admission of any liability by Home Depot.

VI. PAYMENT OF COSTS

If a court of competent jurisdiction determines that Home Depot has failed to comply with any of the terms of this Agreement, Home Depot shall be liable for all litigation and other enforcement costs incurred by the United States or the State to enforce this Agreement or otherwise obtain compliance, including, but not limited to attorneys' fees.

VII. DUE CARE

Nothing in this Agreement shall be construed to relieve Home Depot of its duty to exercise due care with respect to any hazardous substances, pollutants or contaminants at the Property, within the meaning of Section 107(b)(3)(a) of CERCLA, 42 U.S.C. § 9607(b)(3)(a), or its duty to comply with all applicable laws and regulations.

VIII. HOME DEPOT CERTIFICATION

By entering into this Agreement, Home Depot certifies that to the best of its knowledge and belief it has fully and accurately disclosed to EPA and the State all information currently in its possession or control and in the possession or control of its officers, directors, employees, contractors and agents which relates in any way to any contamination or potential contamination at the Property and to its qualifications to enter into this Agreement. Home Depot also certifies that to the best of its knowledge and belief it has not caused or contributed to a release of hazardous substances at the Property. If EPA or the State determine that information provided by Home Depot is not materially accurate and complete, Part IX., (Covenants Not to Sue), of this Agreement shall be void and EPA and the State reserve all rights they may have.



IX. COVENANTS NOT TO SUE

A. In consideration of the actions that will be performed by Home Depot under the terms of this Agreement, and except as specifically provided in Part X., (United States' and State's Reservation of Rights), of this Agreement, the United States and the State covenant not to sue or to take administrative action against Home Depot pursuant to Sections 106, 107(a), or 107(f) of CERCLA, Section 7003 of RCRA, or Article 15 of Title 25 or Article 13 of Title 16, Colorado Revised Statutes (as amended), for injunctive relief, reimbursement of response costs, or damages to natural resources with regard to Present Contamination, and any future migration of Present Contamination, which is not caused or contributed to by Home Depot. These covenants not to sue shall take effect upon Home Depot's purchase of the Property or recording of the Notice and Covenant attached hereto as Exhibit 2, whichever is later. These covenants not to sue extend only to Home Depot and any transferee approved by EPA and the State pursuant to Part XIII of this Agreement and do not extend to any other person.

B. In consideration of the covenants not to sue in Part IX., (Covenants Not to Sue), Paragraph A. of this Agreement, Home Depot covenants not to sue and agrees not to assert any claims or causes of action against the United States or the State, the Hazardous Substance Superfund pursuant to 42 U.S.C. § 9606(b)(2), or the Colorado Hazardous Substances Response Fund pursuant to CRS 25-16-104.6, with regard to Present Contamination and any future migration of Present Contamination, or for reimbursement of funds

expended, expenses incurred, payments made, or work performed relating to the Property, or to seek any other costs, damages, or attorney's fees from the United States or the State, arising out of response activities at the Property. Home Depot's covenants not to sue shall include all claims or causes of action for interference with contracts, business relations and economic advantage. Nothing herein shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.25(d).

C. These covenants not to sue are not general releases under federal law nor the law of any state.

D. With respect to any claim or cause of action asserted by the United States or the State, Home Depot shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Present Contamination or the future migration of Present Contamination which is not caused or contributed to by Home Depot.

X. UNITED STATES' AND STATE'S RESERVATION OF RIGHTS

A. Notwithstanding the covenants not to sue set out in Part IX., (Covenants Not to Sue), above, nothing in this Agreement is intended to be nor shall it be construed to be a release or covenant not to sue for any claim or cause of action, administrative or judicial, at law or in equity, which the United States or the State may have against Home Depot for:

(1) Any liability as a result of failure to provide access, notice and cooperation, or failure to otherwise comply with Part V., (Access/Notice/Institutional Controls), of this Agreement;

(2) Any liability as a result of failure to exercise due care with respect to hazardous substances at the Property;

(3) Any liability resulting from past releases of hazardous substances at the Property caused or contributed to by Home Depot, its lessees or sublessees;

(4) Any liability resulting from past or future exacerbation by Home Depot of the release or threat of release of hazardous substances at the Property;

(5) Failure to cooperate and/or interference with EPA or the State, their response action contractors, or other persons conducting response activities under EPA or State oversight in the implementation of response actions at the Property;

(6) Future transportation and disposal of hazardous substances at the Property;

(7) Claims based on the introduction of any hazardous substance, pollutant, or contaminant by any person at the Site after the effective date of this Agreement;

(8) Any and all criminal liability; and

(9) Any matters not expressly included in the covenants not to sue set forth in Part IX., (Covenants Not to Sue), of this Agreement including, without limitation, any liability to the United States or the State for failure to comply with the terms of this Agreement.

B. With respect to any claim or cause of action asserted by the United States or the State for the liability described in Part X., (United States' and State's Reservation of Rights), Paragraph A.(4) [exacerbation] above, Home Depot shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Present Contamination or the future migration of Present Contamination which is not caused or contributed to by Home Depot.

C. Nothing in this Agreement constitutes a covenant not to sue or to take action or otherwise limits the ability of the United States or the State to seek or obtain further relief from Home Depot, and the covenants not to sue in Part IX. (Covenants Not to Sue), of this Agreement are null and void, if information is discovered which establishes that Home Depot contributed to the release or threat of release of any hazardous substance, pollutant or contaminant at or from the Property prior to the effective date of this Agreement, or that the representation in Part VIII., (Home Depot Certification), of this Agreement was false as of the effective date of this Agreement.

D. Nothing in this Agreement is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States or the State may have against any person not a party to this Agreement.

E. Nothing in this Agreement is intended to limit the right of the United States or the State to undertake future response

actions at the Property or to seek to compel parties other than Home Depot to perform or pay for response actions at the Property or the Site. Nothing in this Agreement shall in any way restrict or limit the nature or scope of response actions which may be taken or be required by the United States or the State in exercising their respective authority under applicable law. Home Depot acknowledges that it is purchasing property where response actions may be required. Home Depot further recognizes that the implementation of response actions may interfere with Home Depot's use of the Property, and may require temporary closure of its operations or a part thereof.

XI. HOME DEPOT'S RESERVATION OF RIGHTS

A. Nothing in this Agreement, except as specifically provided in Parts IX. and X., (Covenants Not to Sue and United States' and State's Reservation of Rights, respectively), of this Agreement, shall be construed as restricting Home Depot's right to lawfully challenge or object to any future response actions which may be proposed by the EPA or the State, at or affecting the Site. Home Depot reserves, and this Agreement is without prejudice to, actions against the United States based on negligent actions taken directly by the United States (not including oversight or approval of Home Depot's plans or activities) that are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA and actions taken against the State for negligent actions taken directly by the State

(not including oversight or approval of Home Depot's plans or activities) that are permitted under State law.

B. Home Depot has not conducted a detailed history of the entire Site and relies solely on the representations of EPA as to the information contained in Part III., (Statement of Facts), Paragraphs A. & B. Home Depot does not, by the signing of this Agreement, acknowledge that the information contained in those Paragraphs is accurate. Home Depot acknowledges that it has been given the opportunity to review and copy EPA's and the State's files concerning this Site.

C. The Parties agree that Home Depot's entry into this Agreement, and the actions undertaken by Home Depot in accordance with this Agreement, do not constitute an admission of any liability by Home Depot.

## XII. CONTRIBUTION PROTECTION

Subject to the reservation of rights in Part X., (United States' and State's Reservation of Rights), of this Agreement, EPA and the State agree that, by entering into and upon carrying out the terms of this Agreement, Home Depot is entitled to such contribution protection as may be provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for matters addressed in the Agreement. Matters addressed in this Agreement include Home Depot's liability for past and future response costs relating to Present Contamination and any future migration of Present Contami-

nation at or from the Property which is not caused or contributed to by Home Depot.

XIII. PARTIES BOUND/TRANSFER OF COVENANT

A. This Agreement shall apply to and be binding upon the United States and the State, and shall apply to and be binding on and benefit Home Depot, its officers, directors, partners, employees, agents, lessees, sublessees, and successors and assigns authorized pursuant to Paragraph B, below. Each signatory of a Party to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party.

B. Notwithstanding any of the provisions of this Agreement, the rights, benefits, and obligations conferred upon Home Depot under this Agreement may only be transferred to another person with the prior written consent of EPA and the State as provided in this Paragraph B. Such consent by EPA and the State shall not be unreasonably withheld. EPA and the State shall respond to a request for consent to transfer within forty-five (45) days after receipt of the request for consent to transfer, except that EPA or the State may extend such period for response an additional 45 days upon written notification of Home Depot and the proposed transfer-ee. A request for consent to transfer shall be considered received, and the time for EPA's and the State's response shall begin, only when all information required to be submitted by

transferor or transferee pursuant to this Paragraph B has been submitted to EPA and the State.

EPA and the State will approve Home Depot's transfer of its rights, benefits, duties and obligations under this Agreement in connection with the transfer of fee title in all or a portion of the Property, provided that Home Depot is in full compliance with this Agreement and the transferee submits to EPA and the State an Affidavit and supporting documentation which demonstrates to the reasonable satisfaction of EPA and the State that: (i) the transferee is financially capable of maintaining the remedy in accordance with the maintenance plan; (ii) the transferee is financially capable of implementing any necessary remedial actions in connection with any exacerbation of, aggravation of, or contribution to Present Contamination on the Property that may occur after the transfer; (iii) the transferee is not liable for the Present Contamination at the Property; (iv) the transferee's use of the Property will not result in a release or threat of release of any hazardous substances; (v) the transferee's use of the Property will not exacerbate, aggravate, or contribute to any Present Contamination on the Property, or pose health risks related to the Present Contamination to any persons on or in the vicinity of the Property; (vi) the transferee acknowledges that they have been notified of the restrictions on the use of the Property as contained in the Notice and Covenant attached hereto as Exhibit 2; (vii) the transferee agrees to be bound by all terms of this



Agreement; and (viii) the transferee has provided any additional information which EPA or the State deems necessary.

The consent of EPA and the State to the proposed transfer shall be based upon its review of the information supplied by transferor and transferee, above. Upon transfer by Home Depot, Home Depot shall be released from any further liability under the Agreement for that portion of the Property conveyed to the approved transferee, but the mutual covenants not to sue set forth in Part IX, above, shall remain in effect.

C. Home Depot agrees to pay the reasonable costs incurred to review any requests for consent to transfer.

D. In the event of a transfer of the Property, the transferee shall be bound by all the terms and conditions, and subject to all the benefits, of this Agreement except as otherwise agreed, in writing, between EPA, the State, and transferee. Moreover, prior to or simultaneous with any transfer of the Property, the transferee must consent in writing to be bound by the terms of this Agreement in order for the covenants not to sue provided in Part IX., (Covenants Not to Sue), Paragraph A., to be available to that Party. These covenants not to sue shall not be effective with respect to any successors, assigns, or transferees who fail to provide such written consent to EPA and the State.

#### XIV. DISCLAIMERS

This Agreement in no way constitutes a finding by EPA, or the State, as to the risks to human health and the environment which

may be posed by contamination at the Property or the Site. This Agreement does not constitute a representation by EPA, or the State, that the Property is fit for any particular purpose.

XV. DOCUMENT RETENTION

The Parties agree that Home Depot's operating records concerning the volume, type and nature of any hazardous substances, pollutants or contaminants that may be generated or released by Home Depot, its lessees, and sublessees or other persons using the Property during their respective operations at the Property may be significant for any determination under Part IX., (Covenants Not to Sue), Paragraph A. of this Agreement. Home Depot agrees to retain and make available all business and operating records, contracts, site studies and investigations, and documents relating to the presence of (i) any hazardous materials, as defined in U.S. Department of Transportation regulations and (ii) any hazardous substances, pollutants or contaminants that may be generated or released at the Property, for at least seven (7) years following the effective date of this Agreement unless otherwise agreed to in writing by the Parties. At the end of seven (7) years, Home Depot shall notify EPA and the State of the location of such documents and shall provide EPA and the State with an opportunity to copy any documents at least ninety (90) days in advance of destruction of such documents. Such documents may be retained on microfilm, CD Rom, or computer Disk, or in their original form. In the event the records are kept in a format other than their original form, Home

Depot agrees to provide a certification to EPA and the State that the documents are true and accurate embodiments of the originals.

XVI. ATTORNEY GENERAL APPROVAL

The Attorney General of the United States or her designee and the Attorney General of the State of Colorado or her designee have conditionally approved the settlement embodied in this Agreement, subject to consideration of any public comments submitted following publication of notice of this Agreement in the Federal Register. Final approval shall be by means of execution of the concurrence pages appended as Attachments 2 and 3.

XVII. EFFECTIVE DATE

The effective date of this Agreement shall be the date, after the close of the public comment period, upon which EPA and the State issue written notice to Home Depot that EPA and the State have fully executed this Agreement, and that no comments have been received or that the comments do not provide a basis for withdrawal of consent.

IT IS SO AGREED BY HOME DEPOT-U.S.A., INC.

By:

*Daniel R. Hatch*  
DANIEL R. HATCH

Title: SENIOR CORPORATE COUNSEL-WESTERN DIVISION

Date:

July 19, 1995

Attested by:

*Jeannette McClain*  
JEANNETTE MCCLAIN

Title:

ASSISTANT SECRETARY

IT IS SO AGREED BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

By:

*Wm Yellowtail*  
WILLIAM P. YELLOWTAIL  
Regional Administrator  
U.S. Environmental Protection Agency  
999 Eighteenth Street, Suite 500  
Denver, Colorado 80202-2405

Date:

26 July 1995

IT IS SO AGREED BY THE STATE OF COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

By:

*Thomas Looby*  
THOMAS LOOBY ~~DIRECTOR~~  
Office of Environment  
Colorado Department of  
Public Health and  
Environment

4300 Cherry Creek Drive S.  
Denver, Colorado 80222  
Telephone: (303) 692-3330

Date:

7/25/95

ATTACHMENT 1  
TO  
AGREEMENT AND COVENANT NOT TO SUE  
RE: DENVER RADIUM SITE OPERABLE UNITS IV & IX

THAT PORTION OF SECTION 15, TOWNSHIP 4 SOUTH, RANGE 68 WEST, OF THE SIXTH PRINCIPAL MERIDIAN IN THE CITY AND COUNTY OF DENVER, STATE OF COLORADO, DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF SAID SECTION 15; THENCE ALONG THE WEST LINE OF SAID SECTION 15 SOUTH 00°0'37" EAST 1320.54 FEET TO THE SOUTHWEST CORNER OF THE NORTHWEST QUARTER OF THE NORTHWEST QUARTER OF SAID SECTION 15; THENCE ALONG THE SOUTH LINE OF SAID NORTHWEST QUARTER OF THE NORTHWEST QUARTER OF SECTION 15 NORTH 89°54'41" EAST 361.50 FEET TO THE TRUE POINT OF BEGINNING; THENCE CONTINUING ALONG SAID SOUTH LINE NORTH 89°54'41" EAST 173.27 FEET; THENCE LEAVING SAID SOUTH LINE NORTH 08°25'08" EAST 134.19 FEET; THENCE NORTH 21°26'19" WEST 104.81 FEET; THENCE NORTH 11°34'41" EAST 395.00 FEET; THENCE SOUTH 38°29'19" EAST 30.00 FEET; THENCE SOUTH 44°28'38" EAST 404.48 FEET; THENCE SOUTH 31°56'30" EAST 155.45 FEET; THENCE SOUTH 22°53'19" EAST 187.20 FEET; THENCE SOUTH 22°51'04" EAST 678.32 FEET TO THE BEGINNING OF A NON-TANGENT CURVE CONCAVE SOUTHWESTERLY, HAVING A RADIUS OF 3794.33 FEET, A RADIAL LINE FROM SAID POINT BEARS SOUTH 67°48'09" WEST; THENCE SOUTHERLY 358.89 FEET ALONG SAID CURVE THROUGH A CENTRAL ANGLE OF 05°25'10"; THENCE NON-TANGENT TO SAID CURVE SOUTH 89°19'27" WEST 141.65 FEET; THENCE NORTH 12°42'33" WEST 311.89 FEET; THENCE SOUTH 89°56'45" WEST 673.82 FEET; THENCE NORTH 00°34'15" WEST 70.00 FEET; THENCE SOUTH 89°56'45" WEST 70.00 FEET; THENCE NORTH 26°12'42" WEST 194.92 FEET; THENCE NORTH 01°03'00" EAST 385.61 FEET; THENCE SOUTH 89°54'41" WEST 40.00 FEET; THENCE NORTH 00°34'15" WEST 30.00 FEET TO THE TRUE POINT OF BEGINNING.

CONTAINING 738,339 SQUARE FEET (16.950 ACRES), MORE OR LESS.

Attachment 2

The United States Department of Justice concurs in the proposed Agreement and Covenant Not to Sue entered into between the United States Environmental Protection Agency, the State of Colorado, and Home Depot U.S.A., Inc.

By: \_\_\_\_\_  
LOIS J. SCHIFFER  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Ben Franklin Station  
Washington, D.C. 20044

Date: \_\_\_\_\_

Attachment 3

The State of Colorado Department of Law concurs in the proposed Agreement and Covenant Not to Sue entered into between the United States Environmental Protection Agency, the State of Colorado, and Home Depot U.S.A., Inc.

FOR THE DEPARTMENT OF LAW

GALE A. NORTON  
Attorney General

STEPHEN K. ERKENBRACK  
Chief Deputy Attorney General

TIMOTHY M. TYMKOVICH  
Solicitor General

PATRICIA S. BANGERT  
Deputy Attorney General

DANIEL S. MILLER  
First Assistant Attorney General

By: \_\_\_\_\_  
ROBERT J. EBER, \*16840\*  
Assistant Attorney General  
Natural Resources Section

Attorneys for State of Colorado

1525 Sherman Street, 5th Floor  
Denver, Colorado 80203  
Telephone: (303) 866-5117  
Fax: (303) 866-3558

Date: \_\_\_\_\_

## EXHIBIT 1

### Statement of Work

#### Denver Radium Site Operable Unit 9 (ROBCO) Phased Remedial Response Actions

##### Introduction

This Statement of Work ("SOW") is Exhibit 1 to the Agreement and Covenant Not to Sue ("Agreement") between the United States Environmental Protection Agency ("EPA"), Colorado Department of Public Health and Environment ("CDPHE" or "State") and Home Depot U.S.A., Inc. ("Home Depot"). Unless otherwise expressly provided herein, terms used in this SOW which are defined in the Agreement, CERCLA, or in regulations promulgated under CERCLA, shall have the meaning assigned to them in the Agreement, CERCLA, or such regulations.

In accordance with the terms of the Agreement, EPA and Home Depot will share work to perform the remedial action to address Metals-Contaminated Soils at Operable Unit 9 (ROBCO) of the Denver Radium Site. In general, the Site will be graded, contaminated soils will be consolidated within the area of contamination, and a cap will be constructed on the area of contamination. The configuration of the area of contamination before remedial action construction, the Pre-consolidation AOC, is depicted in Exhibit A to SOW. Following consolidation, the area of contamination, the Post-consolidation AOC, will have a slightly different configuration and will be shown in as-built drawings at the completion of remedial action activities. Consolidation of the contaminated soils will facilitate future development of the Site by Home Depot.

The remedial action will be conducted in three phases:

- Phase 1 - Soil and debris will be identified and prepared for consolidation within the areas denoted as W1, W2, W3, and W4.
- Phase 2 - Concrete foundations will be demolished and rubblelized. Contaminated soil and debris will be consolidated into areas W1, W2, W3, and W4.
- Phase 3 - Remedial action will be completed by capping the Post-consolidation AOC to prevent direct contact with, or inhalation or ingestion of Metals-Contaminated soils.

Home Depot will conduct the first and third phases of the Remedial Action and EPA will conduct the second phase of the Remedial Action. EPA, CDPHE, and Home Depot shall have access to



the site throughout implementation of the remedial action.

At the completion of Phase 3, and upon approval of the Construction Completion Report, new construction may proceed in accordance with the Agreement and the Operation & Maintenance Plan.

### Prerequisites

#### 1. Ground Water Monitoring Wells

Prior to implementation of any of the phased remedial actions on the ROBCO site, Home Depot may sample and analyze ground water from the ROBCO site ground water monitoring wells. Ground water may be sampled from any of the on- or off-site monitoring wells. At the conclusion of any ground water sampling performed by Home Depot/ROBCO, EPA will abandon the on-site ROBCO monitoring wells. Off-site monitoring wells will be left in place for future monitoring.

#### 2. Work Plans, Specifications, Health & Safety Plan, Operation & Maintenance Plan, and Construction Quality Assurance Plan

Home Depot will develop and submit for acceptance by EPA after CDPHE review and comment, Work Plans, Site Specifications, an Operation & Maintenance Plan, and the Construction Quality Assurance (CQA) Plan. Home Depot will also develop a Health and Safety Plan for EPA and CDPHE review. For consistence in performance standards and implementation of site activities, these site specific plans and specifications will be used by all contractors and others involved with on-site ROBCO remedial actions. The content of these ROBCO site documents will include:

- a. Site drawings identifying the Pre-consolidation AOC, cap construction, and as-built drawings indicating the final configuration of the Post-consolidation AOC.
- b. Project Construction and Quality Control specifications.
- c. Project Quality Assurance Oversight Specifications
- d. Project Health and Safety Plan.
- e. Operation & Maintenance Requirements.

Each of the project performance documents, except the Health and Safety Plan, will require regulatory review and approval from the appropriate regulatory agency (EPA/CDPHE). EPA and CDPHE will review the Health and Safety Plan however the regulatory agencies will not approve this document.

## **PHASE 1 Remedial Action**

Home Depot will prepare the ROBCO site for excavation, segregation, and consolidation of Metals-Contaminated Soils. Site preparation will include:

- Implement work plans, specifications, Health and Safety Plan, and Construction Quality Control procedures.
- Remove rubble and debris from areas to be excavated for clean fill and cap material. Rubble and debris will be stockpiled for Phase 2 action.
- Survey the site to delineate areas within the Pre-consolidation AOC where Metals-Contaminated Soils will be excavated and/or consolidated.
- Stockpile below-action-level soils for cap construction or structural fill.
- Stockpile any above-action-level soils excavated during Phase 1 for consolidation into areas W1, W2, W3, and W4 during Phase 2.
- Screen or cull debris and rubble from excavated below-action-level soils. Rubble and debris will be stockpiled for Phase 2 action. Soils may be used for cap construction or fill material.
- Excavate areas W1, W2, W3, and W4 within the AOC for consolidation of Metals-Contaminated Soils during Phase 2.
- Provide information and data in support of as-built drawings and CQA Report data collection and documentation.

## **PHASE 2 Remedial Action**

EPA will demolish the foundation of the brick plant and the scale house. EPA will also consolidate contaminated soil and debris into areas W1, W2, W3, and W4 within the AOC. Phase 2 activities will include:

- Implement work plans, specifications, Health and Safety Plan, and Construction Quality Control procedures.
- Demolish and rubbelize the existing ROBCO plant and scale house foundations. Contaminated rubble will be segregated from un-contaminated rubble and consolidated within the AOC according to the remedial design work plans and specifications.

- Excavate, place, and compact Metals-Contaminated Soils that have been designated for consolidation in areas W1, W2, W3, and W4. The total volume of contaminated soils to be managed by EPA shall not exceed 27,000 cubic yards.

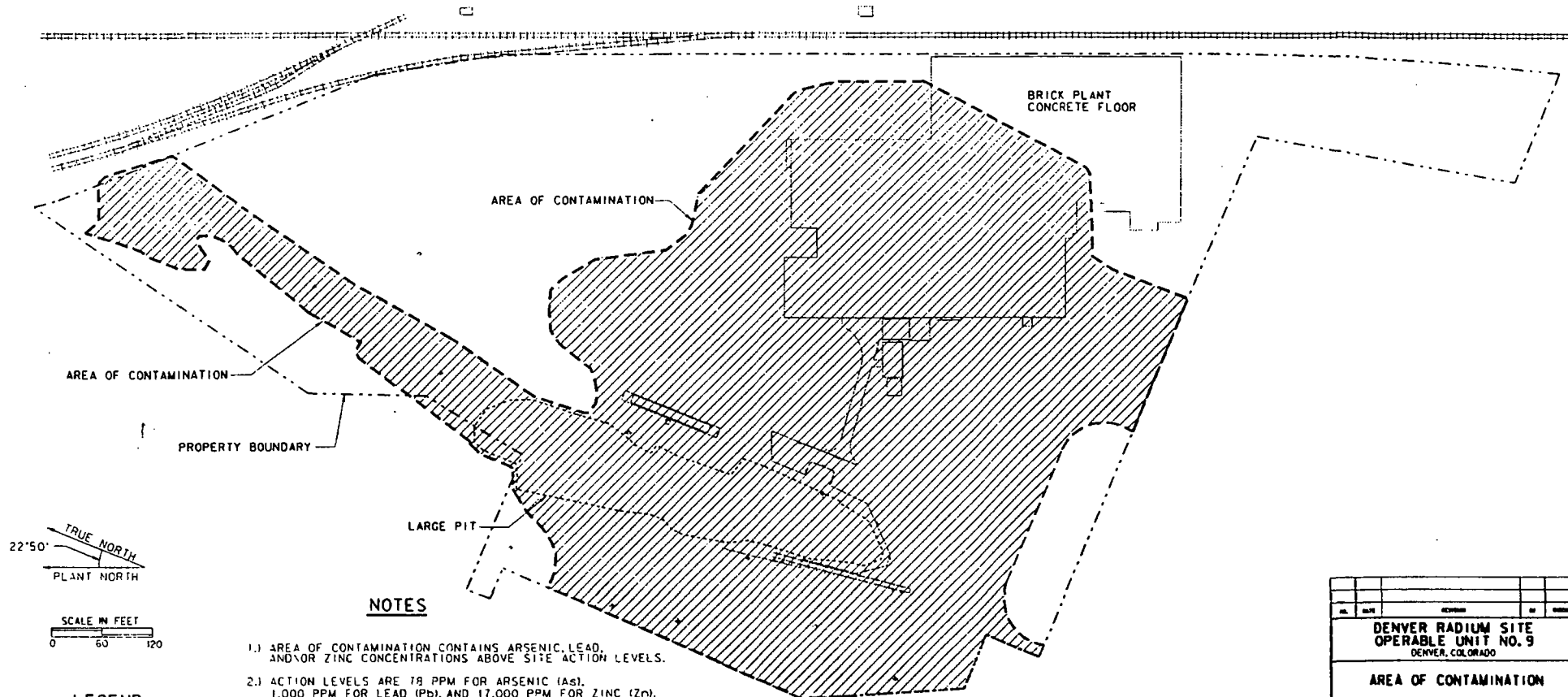
### **PHASE 3 Remedial Action**

Home Depot will complete the remedial action by consolidating, in areas W1, W2, W3 and W4, any remaining Metals-Contaminated soils which Home Depot elects to consolidate, and by capping Metals-Contaminated soils in accordance with the requirements of the Record of Decision. Capping activities will include:

- Implement work plans, specifications, Health and Safety Plan, and Construction Quality Control procedures.
- Construct the cap for the Post-consolidation AOC.
- Construct an area within the Post-consolidation AOC to accommodate contaminated soils exceeding action levels which may be encountered during new Home Depot construction or other future earth-moving activities. Any contaminated soils in this area must be capped for construction to be considered complete. Any future consolidation of contaminated material in this area must be in compliance with the Operation and Maintenance Plan.
- Survey and delineate the Post-consolidation AOC, constructed contours, elevations, and location.
- Prepare and submit to EPA for approval the Construction Completion Report.

### **Schedule**

All three phases of the remedial action shall be completed within two years from the effective date of the Agreement.



### NOTES

- 1.) AREA OF CONTAMINATION CONTAINS ARSENIC, LEAD, AND/OR ZINC CONCENTRATIONS ABOVE SITE ACTION LEVELS.
- 2.) ACTION LEVELS ARE 78 PPM FOR ARSENIC (As), 1,000 PPM FOR LEAD (Pb), AND 17,000 PPM FOR ZINC (Zn).
- 3.) AREA OF CONTAMINATION IS INTERPRETED FROM SOIL ANALYTICAL DATA REPORTED BY UNC-GEOTECH (JULY, 1990), SVERDRUP CORPORATION (SEPT., 1992), AND ERM-ROCKY MOUNTAIN, INC. (DEC. 12, 1994).
- 4.) PROPERTY BOUNDARY BASED ON LAND TITLE SURVEY REPORTED BY NOLTE AND ASSOCIATES, INC. (JUNE 16, 1994).

### LEGEND

- AREA OF CONTAMINATION  
 PROPERTY BOUNDARY

NO.	DATE	REVISION	BY	REMARKS
<b>DENVER RADIUM SITE</b> <b>OPERABLE UNIT NO. 9</b> DENVER, COLORADO				
<b>AREA OF CONTAMINATION</b>				
<b>Sverdrup</b> CORPORATION				
Designed	BCS	Approved	DFB	
Drawn	ESM/BCC	Reviewed	DFB	
Checked	CM 7-25-95			
Date	7-27-95	Sheet No.	1	

EXHIBIT 2

TO

AGREEMENT AND COVENANT NOT TO SUE

RE: DENVER RADIUM SITE OPERABLE UNITS IV & IX

NOTICE AND COVENANT

Notice is hereby given that the real property located in the City and County of Denver, State of Colorado, described in Exhibit A attached hereto and incorporated herein by this reference (the "Property"), with an address of 500 South Santa Fe Drive, Denver, Colorado, has upon it certain hazardous substances that were permitted to remain on the Property in connection with the remedial actions taken by the United States Environmental Protection Agency pursuant to the Declaration for the Record of Decision for the Denver Radium, Operable Unit IX, Robinson Brick Company Property, and that EPA and the State of Colorado make no representations as to the appropriate use of the Property.

Notice is further given that the Property is subject to that certain Agreement and Covenant Not to Sue re: Denver Radium Site Operable Units IV and IX, dated \_\_\_\_\_, 1995 (the "Agreement") as described herein, and that such Agreement shall inure to the benefit of and be binding upon all purchasers of any interest in the Property after the date of such Agreement provided such purchaser enters into certain agreements and the consent of EPA and the State of Colorado is given in accordance with the terms of the Agreement.

In furtherance of the objectives and provisions of the Agreement, Home Depot U.S.A., Inc. ("Home Depot"), as owner of the Property, covenants and agrees that the Property shall be owned, conveyed, held and used subject to all of the following covenants, conditions, restrictions and easements:

1. The development and use of the Property shall be subject to the following provisions:

A. The owner and/or lessee of the Property shall grant to The United States Environmental Protection Agency ("EPA") and the State of Colorado ("State"), their employees, authorized representatives, contractors, agents, and all other persons performing response actions under EPA's or the State's oversight,

an irrevocable immediate right of access at all reasonable times to the Property for the purpose of monitoring compliance with the terms of the Agreement and performing and overseeing response actions selected in the Records of Decision ("ROD") for OU IV and IX at the Site and conducting five-year reviews as provided in Section 121(c) of CERCLA, 42 U.S.C. § 9621(c). EPA or the State agree to provide the owner and/or lessee of the Property with reasonable advance notice of the performance of response actions at the Property. Notwithstanding any provision of the Agreement, EPA and the State retain all of their access authorities and rights, including enforcement authorities related thereto, under CERCLA, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901, et seq., or any other applicable federal or state statute or regulation.

B. Each deed, lease, or other instrument conveying an interest in the Property shall contain a notice stating that the Property is subject to the Agreement and to this Notice and Covenant.

C. Uses of the Property shall be restricted to non-residential uses which are compatible with maintaining the integrity of the cap. The owner and/or lessee of the Property shall not seek to have the Property zoned or designated for residential use, recreational use, or any other uses inconsistent with the remedy selected in the ROD for OU IX or incompatible with maintenance of the integrity of the cap.

D. The owner and/or lessee of the Property shall not drill or allow others to drill water wells on the Property, with the exception of groundwater monitoring wells. The owner and/or lessee of the Property shall not use groundwater or allow others to use groundwater from beneath the Property for any purpose.

E. Development and use of the Property, including development within either the Pre-Consolidation Area of Contamination or the Post-Consolidation Area of Contamination (collectively, the "AOC"), as defined in the ROD and the Agreement, will be permitted in compliance with the Agreement. All Metals-Contaminated Soil (as defined in the Agreement) excavated from within the AOC during development of the Property, or otherwise, shall either be redeposited within the Post-Consolidation AOC and capped, or if not redeposited within the Post-Consolidation AOC, shall be disposed of at a Resource Conservation and Recovery Act Subtitle C permitted facility in compliance with EPA's Off-Site Rule, 40 C.F.R. §

300.440. Prior to redepositing such soils within the Post-Consolidation AOC or shipment off-site for disposal, the owner or lessee of the Property shall notify EPA and the State.

F. The owner or any subsequent purchaser or lessee of the Property acknowledges that it is purchasing or using property where response actions have been implemented pursuant to the RODs for OUs IV and IX. The owner and/or lessee of the Property further acknowledge and agree that the implementation of response actions may interfere with the use of the Property, and may require temporary closure of its operations or a part thereof. EPA and the State have agreed that, if Metals-Contaminated Soils with contamination levels in excess of EPA action levels are removed from beneath a building foundation, they will use every reasonable effort to avoid performing any response actions which might jeopardize or undermine such building foundation and the ground level floor supported by such foundation. The owner and/or lessee of the Property agree to cooperate with EPA and the State in the implementation of response actions selected in the RODs for OU IV and OU IX at the Site, and further agree not to interfere with such response actions. Consistent with EPA's responsibilities under federal law and consistent with the State's responsibilities under state and federal law, EPA and the State have agreed to use reasonable efforts under the circumstances to minimize any interference with the owner's and/or lessee's operations by such response actions.

G. Any leases or deeds for sale or use of the Property shall provide that all current and future owners, lessees, sublessees, transferees, and assignees of the Property must provide the same access, use restrictions, and cooperation as Home Depot provides to EPA and the State under the Agreement, and that any such lease or deed for sale is subject to the Agreement. The owner of the Property shall ensure that any subsequent leases, subleases, sales, assignments or transfers of the Property by such owner are consistent with and subject to the Agreement.

H. The owner and/or lessee of the Property is not obligated under the Agreement to provide funds, materials, supplies, or personnel for completion of the remedy set forth in the Agreement, except for implementing and maintaining institutional controls and maintenance of the permanent cap, as described in Exhibit B to this Notice and Covenant.

I. The owner and/or lessee of the Property agree that it and/or they shall not use the Property in any way which may aggravate, exacerbate, or contribute to Present Contamination at the Property.

2. The EPA and the Colorado Department of Public Health and Environment shall have the right to enforce the provisions of this Notice and Covenant by an action at law brought in the United States District Court for the District of Colorado located in Denver, Colorado.

3. All terms used herein which are defined in the Agreement shall have the same meaning herein as is set forth in the Agreement.

4. This Notice and Covenant shall be deemed to touch and concern the Property and shall run with the land as an equitable servitude and restrictive covenant encumbering the Property. This Notice and Covenant shall be construed and enforced in accordance with the laws of the State of Colorado.

IN WITNESS WHEREOF, the foregoing Notice and Covenant was executed on the \_\_\_\_\_ day of \_\_\_\_\_, 1995.

ATTEST:

HOME DEPOT U.S.A., INC., a Delaware corporation

\_\_\_\_\_  
Secretary By: \_\_\_\_\_  
Its: \_\_\_\_\_

STATE OF \_\_\_\_\_ )  
COUNTY OF \_\_\_\_\_ ) ss.

The foregoing Notice was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 1995, by \_\_\_\_\_ as \_\_\_\_\_ and \_\_\_\_\_ as \_\_\_\_\_ Secretary of HOME DEPOT U.S.A., INC., a Delaware corporation.

WITNESS my hand and official seal.

My commission expires: \_\_\_\_\_

\_\_\_\_\_  
Notary Public



EXHIBIT A  
TO  
NOTICE AND COVENANT

THAT PORTION OF SECTION 15, TOWNSHIP 4 SOUTH, RANGE 68 WEST, OF THE SIXTH PRINCIPAL MERIDIAN IN THE CITY AND COUNTY OF DENVER, STATE OF COLORADO, DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF SAID SECTION 15; THENCE ALONG THE WEST LINE OF SAID SECTION 15 SOUTH  $00^{\circ}0'37''$  EAST 1320.54 FEET TO THE SOUTHWEST CORNER OF THE NORTHWEST QUARTER OF THE NORTHWEST QUARTER OF SAID SECTION 15; THENCE ALONG THE SOUTH LINE OF SAID NORTHWEST QUARTER OF THE NORTHWEST QUARTER OF SECTION 15 NORTH  $89^{\circ}54'41''$  EAST 361.50 FEET TO THE TRUE POINT OF BEGINNING; THENCE CONTINUING ALONG SAID SOUTH LINE NORTH  $89^{\circ}54'41''$  EAST 173.27 FEET; THENCE LEAVING SAID SOUTH LINE NORTH  $08^{\circ}25'08''$  EAST 134.19 FEET; THENCE NORTH  $21^{\circ}26'19''$  WEST 104.81 FEET; THENCE NORTH  $11^{\circ}34'41''$  EAST 395.00 FEET; THENCE SOUTH  $38^{\circ}29'19''$  EAST 30.00 FEET; THENCE SOUTH  $44^{\circ}28'38''$  EAST 404.48 FEET; THENCE SOUTH  $31^{\circ}56'30''$  EAST 155.45 FEET; THENCE SOUTH  $22^{\circ}53'19''$  EAST 187.20 FEET; THENCE SOUTH  $22^{\circ}51'04''$  EAST 678.32 FEET TO THE BEGINNING OF A NON-TANGENT CURVE CONCAVE SOUTHWESTERLY, HAVING A RADIUS OF 3794.33 FEET, A RADIAL LINE FROM SAID POINT BEARS SOUTH  $67^{\circ}48'09''$  WEST; THENCE SOUTHERLY 358.89 FEET ALONG SAID CURVE THROUGH A CENTRAL ANGLE OF  $05^{\circ}25'10''$ ; THENCE NON-TANGENT TO SAID CURVE SOUTH  $89^{\circ}19'27''$  WEST 141.65 FEET; THENCE NORTH  $12^{\circ}42'33''$  WEST 311.89 FEET; THENCE SOUTH  $89^{\circ}56'45''$  WEST 673.82 FEET; THENCE NORTH  $00^{\circ}34'15''$  WEST 70.00 FEET; THENCE SOUTH  $89^{\circ}56'45''$  WEST 70.00 FEET; THENCE NORTH  $26^{\circ}12'42''$  WEST 194.92 FEET; THENCE NORTH  $01^{\circ}03'00''$  EAST 385.61 FEET; THENCE SOUTH  $89^{\circ}54'41''$  WEST 40.00 FEET; THENCE NORTH  $00^{\circ}34'15''$  WEST 30.00 FEET TO THE TRUE POINT OF BEGINNING.

CONTAINING 738,339 SQUARE FEET (16.950 ACRES), MORE OR LESS.

**EXHIBIT B  
TO  
NOTICE AND COVENANT**

**OPERATIONS AND MAINTENANCE PLAN REQUIREMENTS**

The Operations and Maintenance Plan ("O&M Plan") will be implemented, monitored and recorded in accordance with this agreement. Except as noted, the implementation of the O&M Plan will be performed by HOME Depot U.S.A. The O&M Plan will include the following:

- EPA Region 8 or the State will perform off-site ground water monitoring and reporting;
- An annual inspection and professional engineer's certification that the closure caps are being maintained and operated in accordance with this Agreement and the Record of Decision ("ROD");
- Any breach of the soil cap system over the Post-Consolidation Area of Contamination, exposure of the surface of the Post-Consolidation Area of Contamination, release of contaminated soils, or off-site not-permitted discharge of surface waters that has come into contact with contaminated soils on the property will be reported to EPA Region 8 and the Colorado Department of Public Health and Environment as prescribed by the O&M Plan and the ROD;
- Construction of surface water management systems on the ROBCO Property Site in such a manner as not to provide a hydraulic influence to the Post-Consolidation Area of Contamination;
- New construction, remodeling, and site repair generally will not be conducted in the Post-Consolidation Area of Contamination for soils that exceed the site screening criteria (risk-based clean-up standard);
- Repair work, new construction, or remodeling that may come into contact with the Post-Consolidation Area of Contamination will be performed in accordance with the ROBCO Site Specifications, CQA Plan, Work Plans, and Health and Safety Plans, or as modified, with the approval of EPA Region 8 and the Colorado Department of Public Health and Environment;
- The management of soils that exceed the site screening criteria encountered during repair work, new construction, or remodeling will be done in accordance with this Agreement and the Record of Decision by placing and effectively managing those soils that exceed the site screening criteria on-site in the Post-Consolidation Area of Contamination or by transportation and management at a

permitted Resource Conservation and Recovery Act (RCRA) Facility, and:

- Records of inspections, professional engineer's certifications, work activities in or near the Post-Consolidation Area of Contamination will be maintained by Home Depot on accordance with this agreement.
- Several small areas of radium and thorium contamination were left on-site at depth. These remaining pockets of radiological contamination present little or no health risk if left undisturbed. These areas are identified in the Supplemental Standards Report for Operable Units IV/V (March 1994). Should Home Depot's activities at the Site require excavation of one or more of these areas, any radioactive material above the action levels identified in the OU IV/V ROD would be required to be managed in accordance with appropriate health and safety regulations. "Management" could mean re-burial at depth.

**EXHIBIT 3**  
**TO**  
**AGREEMENT AND COVENANT NOT TO SUE**  
**RE: DENVER RADIUM SITE OPERABLE UNIT IV AND IX**  
**OPERATIONS AND MAINTENANCE PLAN REQUIREMENTS**

The Operations and Maintenance Plan ("O&M Plan") will be implemented, monitored and recorded in accordance with this agreement. Except as noted, the implementation of the O&M Plan will be performed by HOME Depot U.S.A. The O&M Plan will include the following:

- EPA Region 8 or the State will perform off-site ground water monitoring and reporting;
- An annual inspection and professional engineer's certification that the closure caps are being maintained and operated in accordance with this Agreement and the Record of Decision ("ROD");
- Any breach of the soil cap system over the Post-Consolidation Area of Contamination, exposure of the surface of the Post-Consolidation Area of Contamination, release of contaminated soils, or off-site not-permitted discharge of surface waters that has come into contact with contaminated soils on the property will be reported to EPA Region 8 and the Colorado Department of Public Health and Environment as prescribed by the O&M Plan and the ROD;
- Construction of surface water management systems on the ROBCO Property Site in such a manner as not to provide a hydraulic influence to the Post-Consolidation Area of Contamination;
- New construction, remodeling, and site repair generally will not be conducted in the Post-Consolidation Area of Contamination for soils that exceed the site screening criteria (risk-based clean-up standard);
- Repair work, new construction, or remodeling that may come into contact with the Post-Consolidation Area of Contamination will be performed in accordance with the ROBCO Site Specifications, CQA Plan, Work Plans, and Health and Safety Plans, or as modified, with the approval of EPA Region 8 and the Colorado Department of Public Health and Environment;
- The management of soils that exceed the site screening criteria encountered during repair work, new construction, or remodeling will be done in accordance with this Agreement and the Record of Decision by placing and effectively managing those soils that exceed the site screening criteria on-site in the Post-Consolidation Area of

Contamination or by transportation and management at a permitted Resource Conservation and Recovery Act (RCRA) Facility, and:

- Records of inspections, professional engineer's certifications, work activities in or near the Post-Consolidation Area of Contamination will be maintained by Home Depot on accordance with this agreement.
- Several small areas of radium and thorium contamination were left on-site at depth. These remaining pockets of radiological contamination present little or no health risk if left undisturbed. These areas are identified in the Supplemental Standards Report for Operable Units IV/V (March 1994). Should Home Depot's activities at the Site require excavation of one or more of these areas, any radioactive material above the action levels identified in the OU IV/V ROD would be required to be managed in accordance with appropriate health and safety regulations. "Management" could mean re-burial at depth.